MOTION FILED
DEC 2 2 1998

No. 98-878

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

CULT AWARENESS NETWORK,
Petitioner,

VS.

JASON SCOTT,
Respondent.

On Petition for Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF AMERICAN FAMILY FOUNDATION ("AFF"), HALT, INC. – AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM ("HALT"), JEWS FOR JUDAISM, WATCHMAN FELLOWSHIP IN SUPPORT OF PETITIONER

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December 1998

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

American Family Foundation ("AFF"), HALT, Inc. — An Organization of Americans for Legal Reform ("HALT"), Jews for Judaism and Watchman Fellowship ("*amici*") hereby respectfully move for leave to file the attached brief as *amici curiae*. The attorney for the petitioner has given consent. Consent of the attorney for respondent was requested but refused.

Amici's perspectives illuminate the importance of this case in which they all have an interest as non-profit organizations engaged in advocacy and dependent on volunteers. As Judge Kozinski's dissent to the denial of rehearing *en banc* explained, the Court of Appeals' unprecedented expansion of derivative liability erodes precedents of this Court, notably *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and takes "a great leap backwards in the protection of First Amendment freedoms." *Scott v. Ross*, 151 F.3d 1247, 1250. Erosion of *Claiborne Hardware* exposes *amici* and other non-profits to burdensome threats and litigation, including efforts to silence their advocacy messages and chill dissemination of controversial views.

As Mothers Against Drunk Driving ("MADD") stated in an *amicus* letter to the Ninth Circuit endorsing these *amici*'s legal arguments:

> MADD's programs [of public awareness, education, legislation and aggressive enforcement] are furthered by the efforts of tens of thousands of unpaid volunteers at the local level. These persons are not officers, employees or directors of MADD, but rather volunteers committed to MADD's mission. MADD's national office does not exercise control over the activities of the individual volunteers. To hold MADD liable under a

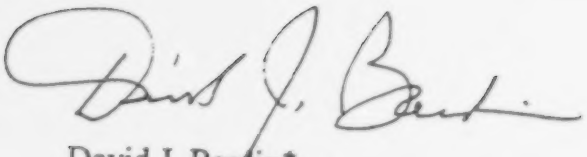
respondeat superior or vicarious liability theory for the actions of its low-level volunteers would so severely hamstring MADD's activities that it could no longer conduct its highly successful advocacy and victim support services.

So, too, all *amici* have an interest in limiting derivative liability based on unauthorized actions of a volunteer under 42 U.S.C. §1985(3) and under other federal statutes, because vicarious liability under *each* federal statute is an issue of "the general common law of agency, rather than the law of any particular State." *Burlington Indus. v. Ellerth*, 141 L. Ed. 2d 633, 648-49 (1998).

Amici's brief here supplies materials (as did *amici*'s brief before the Ninth Circuit) showing that the general common law distinguishes between volunteers and agents who are paid servants, as well as showing why "[n]o inference of agency can be drawn from activities that advance both the actor's and the organization's interests" *when both* organization and member *are engaged in the same non-profit activity* (*e.g.*, religious "good works or missionary activities" or "pursuing civil rights goals") and why "[t]he *presumption should not be one of agency* but one of *nonagency*." E.M. Gaffney, Jr. & P.C. Sorensen, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS (H.C. Griffen, ed. Macon: Mercer University Press 1984) at 90 [emphasis added].

In addition, the three *amici* which are "anti-cult" advocacy organizations (AFF, Jews for Judaism and Watchman Fellowship) have a more specific interest in the application of the class-based animus test under the second clause of 42 U.S.C. §1985(3) in this case. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

Respectfully submitted,



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QUESTIONS PRESENTED*

1. Whether imposing vicarious liability for compensatory and punitive damages based solely on a volunteer's acts that were not authorized, controlled, ratified by or even known to a non-profit advocacy organization violates the First Amendment rights of association and free speech protected by this Court's rulings, notably *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)?

2. Whether 42 U.S.C. §1985(3) creates a cause of action for compensatory and punitive damages against a non-profit advocacy organization for vicarious liability based solely on a volunteer's acts that were not authorized, controlled, ratified by or even known to the non-profit?

3. Whether a class-based animus, requisite for liability under the second clause of 42 U.S.C. § 1985(3), may consist of animus against a particular church affiliation?

* HALT joins only as to Questions 1 and 2.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iii
INTEREST OF *AMICI CURIAE* 1
CONSTITUTIONAL PROVISION AND STATUTE 3
STATEMENT 3
REASONS FOR GRANTING THE PETITION* 6
A. This Court's vital First Amendment precedents which the Court of Appeals evaded preclude derivative liability of a non-profit advocacy organization for compensatory and punitive damages based solely on a volunteer's acts that were not authorized, controlled, ratified by or even known to the non-profit 7
B. It is important to determine whether the general common law of agency also precludes derivative liability for compensatory and punitive damages under 42 U.S.C. §1985(3) based solely on acts of a volunteer that were not authorized, controlled, ratified by or even known to the non-profit, especially in view of the inter-circuit conflict 10
C. Circuits are divided on the important question under 42 U.S.C. §1985(3) whether animus against a church affiliation satisfies the class-based animus test 16
CONCLUSION 18
APPENDIX A: Constitutional Provision and Statute
APPENDIX B: CAN Materials in the Record

* HALT joins only as to reasons A and B.

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Pate, 445 F.2d 105 (7th Cir. 1971) 16
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 9
Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 7, 16, 17
Burlington Indus.v. Ellerth, 141 L. Ed 2d. 633 (1998) 6, 10
City of Seattle v. Beezer, 376 U.S. 224 (1964) 10
Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) 10
Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925) 9
Cult Awareness Network, Inc. v. Martino, 151 F.3d 605 (7th Cir. 1998) 1
Griffin v. Breckenridge, 403 U.S. 88 (1971) 16
NAACP v. Claiborne Hardware Co., 458 U.S. 886, *reh'g denied*, 459 U.S. 898 (1982) ..... i, 5, 6, 7, 8, 9, 10
NAACP v. Overstreet, 384 U.S. 118, *reh'g denied*, 384 U.S. 981 (1966) 9
Owens v. Haas, 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979) 16
Peterson v. Sorlien, 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981). 17
Scott v. Ross, 140 F.3d 1275 (9th Cir. 1998) 5
Scott v. Ross, 151 F.3d 1247 (9th Cir. 1998) 6, 7
United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922) 9
United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 9
Ward v. Connor, 657 F.2d 45 (4th Cir. 1981) 17
Ward v. Connor, 495 F. Supp 434 (E.D. Va. 1980) 17
Word of Faith Outreach Center Church, Inc. v. Sawyer,

90 F.3d 118 (5th Cir. 1996) 17

CONSTITUTION AND STATUTES:

U. S. Constitution, Amdt. 1 ..... passim
42 U.S.C. §1985(3) ..... passim

OTHER AUTHORITIES:

M.E. Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. TRIAL ADVOCACY 289 (1993) 12
Constitutional Law, 96 HARVARD L. REV. 62 (1982) 10
E.M. Gaffney, Jr. & P.C. Sorensen, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS (H.C. Griffen, ed. Macon: Mercer University Press 1984) 11, 12, 13-15
Harper, James & Gray, THE LAW OF TORTS (2d ed. 1986) 11, 12
W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS 11, 12
RESTATEMENT (SECOND) OF AGENCY (1957) 11

INTEREST OF *AMICI CURIAE*[1/]

Amici are national non-profit advocacy organizations which rely heavily on volunteers. Expansion of vicarious liability by the Court of Appeals burdens *amici* with financial risks and arms those who would silence controversial messages. *Amici* deal with issues which often evoke strongly-held, conflicting positions. They prepare and disseminate materials to communicate their views in various forms.

Volunteers help *amici*'s advocacy and other work in critical ways. Volunteers share *amici*'s missions and values but perform tasks for *amici* with limited supervision; they are used part time and are also free to further their goals and earn their living independently, either as individuals or with other non-profit or business groups.

AFF, Jews for Judaism and Watchman Fellowship significantly address issues concerning groups commonly referred to as "cults" or "destructive cults." HALT does not.

American Family Foundation ("AFF") is a national non-profit dedicated to educating the public about the dangers of destructive cults. AFF publishes the *Cultic Studies Journal*, the only juried journal specializing in this field, as well as books and newsletters, and holds conferences of professionals from

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1/ No counsel for a party in this matter authored this brief in whole or in part. No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

Counsel of record also submitted a brief to the Court of Appeals in this matter on behalf of *amici*. Counsel of record has represented petitioner in other matters, including appeals regarding bankruptcy sale of CAN's name culminating in *CAN v. Martino*, 151 F.3d 605 (7th Cir. 1998), final stages of CAN's Section 7 bankruptcy and as a registered lobbyist.

multiple disciplines for the public as well as workshops for families and ex-members. AFF has eight paid staff and at least ten times more volunteers drawn from clergy, education, law enforcement and legal, medical and mental health professions. AFF objects to unethical conduct by destructive groups and exploitation of the vulnerable whether carried on by religious or secular groups but respects informed voluntary decisions of adults. Its perspective is wholly secular and involves no theological positions.

HALT, Inc. — An Organization of Americans for Legal Reform ("HALT") is a national non-partisan non-profit organization with over 50,000 members, dedicated to helping Americans handle their legal affairs simply, affordably and equitably. HALT conducts educational and advocacy programs that promote self-help law materials, the right to litigate *pro se*, the use of independent paralegals, and attorney accountability — controversial positions that question unauthorized practice of law regulations enforced by the states and the adequacy of state-administered attorney discipline systems. HALT publishes and distributes self-help law materials and a quarterly newsletter, and maintains an internet site whch incíudes materials prepared by HALT staff and by volunteers who submit articles. It also provides a referral service of volunteer attorneys.

Jews for Judaism is a national non-affiliated non-denominational non-profit serving the whole Jewish community. Its principal purpose is to provide information on methods and practices of deceptive missionary and cult groups that target the Jewish community for conversion. It facilitates and promotes positive Jewish experiences in dealing with such deceptive groups, through counseling services, outreach programs for unaffiliated and estranged Jews, encounter groups, lec-

tures and production of books, periodicals, pamphlets, and video and audio material.

Watchman Fellowship is a non-profit, international, Christian ministry concerned with cults and new religious movements. Its focus is research, education and counseling family of cult members and interventions with cult members. It publishes training materials and two magazines. It works with twenty paid staff in seven states and one foreign country, and at least as many volunteers. It has an Evangelical Christian theological stance.

CONSTITUTIONAL PROVISION AND STATUTE

The First Amendment to the United States Constitution and pertinent provisions of 42 U.S.C. §1985(3) are set forth in Appendix A.

STATEMENT

Respondent Jason Scott won a judgment against petitioner, Cult Awareness Network ("CAN"), including $87,500 for the state tort of referral negligence and $1,000,000 for punitive damages under 42 U.S.C. §1985(3). CAN's liability depended entirely on holding that Shirley Landa, a volunteer "contact person" of CAN who is not a defendant, acted on CAN's behalf (rather than independently of CAN) (a) in making a referral and (b) in allegedly conspiring to deprive Mr. Scott of his right to travel to Mexico motivated, it was claimed, by an invidious class-based animus against Mr. Scott's church, Life Tabernacle Church of Seattle.

Mr. Scott's mother had become hostile to the Life Tabernacle Church while a member, left the church and then got in

touch with Ms. Landa (without contacting CAN or knowing it existed) seeking victim support. Ms. Landa referred her to defendant Rick Ross, who involved the other individual defendants. None of the defendants was a CAN agent.

Mr. Ross convinced Mr. Scott's two younger brothers, both minors, to leave the church as their mother wished, but he failed to get Mr. Scott to meet with him. Mr. Ross and the other individual co-defendants later wrongfully abducted and detained Mr. Scott on his mother's behalf in 1991 in order to persuade him to leave this church.

CAN did not condone the wrongful conduct. Long-standing CAN policies condemned such conduct. CAN, headquartered in Illinois, never heard of the plans before Mr. Ross's unlawful conduct. CAN believed Ms. Landa's statements that she had not condoned or participated in or plotted the unlawful conduct of the individual defendants. Although Ms. Landa held no office in the CAN organization, being a part-time, low-level volunteer, years earlier she had been a founding board member of CAN's predecessor.

Ms. Landa did not use CAN's name, letterhead, telephone line, premises or equipment. She was neither an employee nor a paid contractor for CAN.

The District Court held that Ms. Landa was CAN's agent and that CAN authorized and ratified her actions. It reasoned that CAN could have terminated Ms. Landa's status as a volunteer "contact person" and had not done so after Mr. Scott's allegations. It held that unspecified "inflammatory information on cults" disseminated by Ms. Landa to Mr. Scott's mother (supposedly in accord with CAN practice) was causally related to Mr. Scott's abduction and indicated conspiracy. The District

Court also regarded materials on cults to "be negative and highly inflammatory by definition" and, therefore, as grounds for sustaining the million dollar punitive damages award. The District Court did not discuss the only specific example of CAN-disseminated materials which was in evidence (appended hereto as Appendix B).

The Court of Appeals affirmed. Judge Beezer's majority opinion stated both that "CAN has been directly linked to the acts of its agent Landa" and that "CAN is not being held liable for any of its speech or associations, but rather for its agent's involvement." Pet. App. A-12. It did not mention any supposedly "inflammatory" materials on which the District Court had relied. The majority declared that this Court merely held in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), that: "Because the NAACP's spokesman was not liable, the NAACP, as his principal, could not be held liable." *Id.* In conflict with decisions of other circuits, the majority also held that vicarious liability for compensatory and punitive damages may be imposed under 42 U.S.C. §1985(3).

Dissenting, Senior District Judge Schwartzer held that Ms. Landa (although sometimes CAN's agent) had not acted on CAN's behalf here. Pet. App. A-20, *Scott v. Ross*, 140 F.3d 1275, 1286 (9th Cir. 1998).

CAN unsuccessfully sought rehearing. Judge Kozinski, joined by Judges Pregerson, Reinhardt, Kleinfeld, Hawkins, Tashima and McKeown, dissented from denial of rehearing *en banc* on two grounds: First, majority's theory that Ms. Landa was acting as CAN's agent is based on a dubious premise. More importantly, in "direct contravention of the Supreme Court's holding in *Claiborne Hardware*, the majority literally holds CAN guilty by association. .... We have taken a great

leap backwards in the protection of First Amendment freedoms." Pet. App. B-4, B-8, *Scott v. Ross*, 151 F.3d 1247, 1248, 1250 (9th Cir. 1998).

REASONS FOR GRANTING THE PETITION[2/]

A. The Court of Appeals has put non-profit advocacy organizations at great risk by letting lower court views of the common law as well as reliance on unspecified and unscrutinized "inflammatory" literature trump this Court's interpretation of the Constitution. Disregard for First Amendment limitations established by this Court's precedents culminating in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), will have a chilling effect as Judge Kozinski explained for the seven dissenters below. If there were any question about *Claiborne Hardware*'s viability, plenary review of the expansion of vicarious liability below would be urgent to refresh a vital Constitutional legacy. Because the dissenters correctly argue that the Ninth Circuit has flouted *Claiborne Hardware*'s doctrine, this Court may wish to consider summary reversal.

B. It is important to review agency and tort law policy, as interpreted below, in light of First Amendment considerations because of the vital role of volunteerism in our society. For reasons of uniformity, "the general common law of agency" governs under each federal statute "rather than the law of any particular State," as this Court reiterated six months ago. *Burlington Indus. v. Ellerth*, 141 L. Ed. 2d 633, 648-49 (1998). This case offers the opportunity to focus both on: (1) critical differences between master-servant and, even paid, non-servant agency relationships and (2) more fundamentally, on which activities entail any agency relationship at all between non-

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2/ HALT joins only as to reasons A and B.

profit organizations and *unpaid member/ volunteers*? As a matter of general common law, liability (particularly punitive liability) for conduct of a member should not be imposed on a non-profit association unless the non-profit was specifically involved in the misconduct. And there should be a *presumption* of *nonagency*. Indeed (and *a fortiori*), the Ninth Circuit's application of 42 U.S.C. §1985(3) below put it in conflict with *every other court* that has considered whether compensatory or punitive damages may be imposed solely on the basis of *respondeat superior* (cases that involved paid-employee agents).

C. Application of 42 U.S.C. §1985(3) also involves an inter-circuit conflict as to whether animus against a religious affiliation meets the class-based animus test. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

A. This Court's vital First Amendment precedents which the Court of Appeals evaded preclude derivative liability of a non-profit advocacy organization for compensatory and punitive damages based solely on a volunteer's acts that were not authorized, controlled, ratified by or even known to the non-profit.

Claiborne Hardware established the highest First Amendment protection for advocacy (even if mixed with some unlawful violence); it required independent appellate scrutiny of the record; and it applied these principles both as to alleged conduct of a paid agent and, independently, as regards alleged liability of his non-profit principal. As Judge Kozinski explained, "*Claiborne Hardware* limits derivative liability to protect freedom of association." Pet. App. B-6, 151 F.3d 1247, 1250. In his words, the Court of Appeals, devoting merely "a single sentence" of "[f]allacious reasoning" to that seminal First Amendment case, brushed aside *Claiborne Hardware*. *Id.* at B-5.

> The reach of strict vicarious liability is potentially endless, and crushing verdicts based on such attenuated claims can easily silence nonprofit organizations. As the Court explained in *Claiborne Hardware*: "To equate the liability of the national organization with that of the Branch in the absence of any proof that the national authorized or ratified the misconduct in question could ultimately destroy it."

Id. at B-6/7. That happened to CAN, a troubling result "regardless of where one falls on the political spectrum."[3/]

Particularly disturbing was the District Court's reliance upon unspecified literature expressing CAN's controversial positions on "cults" and "mind control" as bases for imposing both compensatory and punitive damages on this advocacy non-profit. The District Court found that Ms. Landa was an "active member" of CAN who gave literature to Mr. Scott's mother which must be inflammatory "by definition." Pet. App. D-3, D-6, D-7. But neither it nor the Court of Appeals evidenced having read the contents of any "inflammatory" material at all, much less of satisfying this Court's ruling, quoted by Judge Kozinski:

> As the Supreme Court has noted: "[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation 'to make an independent examination of the whole record' to make sure that 'the judgment does not constitute a forbidden intrusion in the field of free expression.'"

[3/] *Id.* at B-7 (an observation as aptly characterizing the seven judges who joined in the dissent as it does Judge Kozinski's illustrative examples: ACT UP, Planned Parenthood and the NRA).

Pet. App. B-6, quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984).

Were *Claiborne Hardware* a *sui generis* case, one might be tempted to overlook the bald conflict between the Ninth Circuit majority and this Court's precedent. But *Claiborne Hardware* builds on several decades of jurisprudence starting with *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 304-05 (1925) and *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 395 (1922) (where alleged conspiracy by local labor union was not authorized, ratified or apparently authorized by national union, only the local could be liable). *See also* rejections of argument that a national organization *implictly* ratified a volunteer's actions by failure to terminate his status.[4/]

As *Claiborne Hardware* and the dissent in *Overstreet* (which it endorses) stress,[5/] it is vital that non-profit associations engaged in bringing matters of controversy before the public should not have their rights and the rights of their members chilled by the threat of liability such as is raised here. These principles endure, even though areas in controversy may shift over the years — areas which today include environmental advocacy, abortion, tax reform, health care, civil justice reform, limits on government role in society, homelessness and discrimination based on race, religion, national origin or sexual preference.

[4/] Justice Douglas in *NAACP v. Overstreet*, 384 U.S. 118, 125 (1966) (dissent), *reh'g denied*, 384 U.S. 981 (1966); and Justice Brennan in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *see also* Justice Harlan's concurrence. 383 U.S. at 742.

[5/] *Claiborne Hardware*, 458 U.S. at 932-33, quoting with approval Mr. Justice Douglas's dissent from dismissal of a writ of certiorari.

In view of the conflict below with past decisions of this Court, the Court may wish to consider summary reversal.[6/]

B. It is important to determine whether the general common law of tort and agency also precludes derivative liability for compensatory and punitive damages under 42 U.S.C. §1985(3) based solely on acts of a volunteer that were not authorized, controlled, ratified by or even known by the non-profit, especially in light of the inter-circuit conflict.

Because volunteerism plays so vital a role in our society, it is important to review interpretation of agency and tort law policy under this statute — as illuminated by First Amendment considerations. Where "a uniform and predictable standard must be established as a matter of federal law" in implementing a federal statute, "the general common law of agency rather than the law of any particular State" guides interpretation of the statute, with this Court looking to text books as a point of departure. *Burlington Industries v. Ellerth*, 141 L. Ed. 2d 533, 648-49 (1998), quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989).

[6/] This Court has summarily reversed even the highest Court of the State of Washington in order to vindicate federal law. *See, City of Seattle v. Beezer*, 376 U.S. 224 (1964). Here, both the District Court and Judge Beezer's majority opinion "blindly applied" their own projections of State of Washington tort and agency doctrine, where the highest court of that State had not spoken, instead of either applying *Claiborne Hardware* "to prevent chilling the right of free association" or interpreting agency law as regards volunteers so as to avoid the First Amendment issue. *Constitutional Law*, 96 HARVARD L. REV. 62, 171, 176 (1982).

Even within the sphere of *commercial* agency relationships,[7] texts differentiate servant from non-servant agency. The RESTATEMENT (SECOND) OF AGENCY (1957) ("RESTATEMENT") sharply distinguishes master-servant[8] from other forms of commercial agency. Prosser and Keeton, explain:[9]

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[7] *I.e.*, relationships characterizing consent by principal and agent for (1) agent to act on behalf of the principal and (2) primarily for principal's benefit (3) with right of the principal to control conduct of the agent relative to the undertaking, or (4) a representation of agency and reliance thereon. E.M. Gaffney, Jr. & P.C. Sorensen, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS (H.C. Griffen, ed. Macon: Mercer University Press 1984) at 34.

[8] *See* RESTATEMENT § 220(2) and Comment thereupon, especially *h. Factors indicating the relation of master and servant* ("The relation of master and servant is indicated by the following factors: an agreement for close supervision or *de facto* close supervision of the servant's work; work which does not require the services of one higly educated or skilled; the supplying of tools by the employer; payment by hour or month; employment over a considerable period of time with regular hours; full time employment by one employer; ... ; the fact that the community regards those doing such work as servants; the belief by the parties that there is a master and servant relation; an agreement that the work can not be delegated.") *See also* RESTATEMENT definitions and comments which stress receipt of money or other property as key factors in defining responsibility (*id.* 14 L.(2)) and primary allegiance (*id.* § 14 L. Comment on Subsection (1)*a.*), concepts at odds with unpaid volunterism and its multiple relationships. And *see* RESTATEMENT §251 limiting liability of a principal for acts of a non-servant agent.

[9] W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 508 [footnote omitted] (5th ed. 1984). American jurisprudence recognizes vicarious liability and *respondeat superior* as doctrines based on social policy considerations rather than on fault or evidentiary problems of proof. 5 Harper, James & Gray, THE LAW OF TORTS 2-23 (2d ed. 1986) (Vicarious Liability, Topic A. Bases in History, Reasoning and Policy); Prosser and Keeton, *supra*,, at 499-500. These doctrines emerged with little need for attention to the nonprofit sector since charitable immuni-

> Since an agent who is not a servant is not subject to any right of control by his employer over the details of his physical conduct, the responsibility ordinarily rests upon the agent alone, and the principal is not liable for the torts which he may commit.

In contrast to commercial enterprises that rely largely on employees (as well as independent contractors), non-profits commonly rely on unpaid members, unrelated persons who support their ideals and concerns, and other volunteers — in order to leverage their ability to fulfill their goals. Risks of "ascending liability" for acts or omissions of volunteers concern non-profit associations in their day-to-day work.[10/] Of particular concern is expansion of liability to cover what a volunteer advocates as regards a controversial issue. As the Mothers Against Drunk Driving ("MADD") *amicus* letter to the court below states:

> MADD's programs [of public awareness, education, legislation and aggressive enforcement] are furthered by the efforts of tens of thousands of unpaid volunteers at the local level. These persons are not officers, employees or directors of MADD, but rather volunteers committed to MADD's mission. MADD's national office does not exercise control over the activities of the individual volunteers. To hold MADD liable under a

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ty from tort liability then flourished. The pragmatic judicial objectives of vicarious liability are either accident prevention or allocation of risk to those best able to pay. 5 Harper, James & Gray, *supra*, § 26.3 at 14-15; Prosser and Keeton, *supra*, at 500.

10/ Gaffney & Sorensen, *supra*, and M.E. Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. TRIAL ADVOCACY 289 (1993)

> *respondeat superior* or vicarious liability theory for the actions of its low-level volunteers would so severely hamstring MADD's activities that it could no longer conduct its highly successful advocacy and victim support services.

The case of a *volunteer* non-servant dramatizes critical differences, some apparent in the general common law but all overlooked below. Most fundamentally: As to what acts does *any* agency relationship exist in the case of non-profit organizations with which unpaid member/volunteers associate in order to advance a shared mission? Professors Gaffney and Sorenson's analysis — which leads them to urge a *presumption* of *nonagency* — shows the importance of reviewing this case.[11/]

> The requisite characteristics of an agency which give rise to vicarious liability ... raise unique problems when applied in the nonprofit context. While the application of agency concepts would not differ in the profit and nonprofit contexts when the relationships remain the same (for example, employer-employee), there are unique nonprofit relationships to which their application raises distinctive issues.
>
> * * * * *
>
> A church ... may be liable for negligence of its employees, yet it does not necessarily follow that members of its congregation are to be viewed as working on behalf or for the benefit of the church whenever they engage in good works urged upon them by church doctrine. Nor is it clear that it would make a difference, in terms of benefit to the church, if the work were done in the name of the church in response to an aspirational com-

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[11/] *Id.* at 34-38 [footnotes omitted].

mand thereof. Does a Boy Scout in uniform, by assisting an elderly person across the street, benefit the Boy Scouts of America? Is his action on behalf of the scout organization? There are obvious differences, it would seem, between serving an organization and serving that organization's ideals—between accomplishing duties assigned by an organization and pursuing its members' common interests or shared aspirations.

* * * * *

Activities by officers and employees and by related organizations in the profit sector do not ordinarily present problems as to on whose behalf or benefit they are taken. The status of the relationship or the scope of the employment generally resolves that issue. Activities by members or affiliates of nonprofit organizations can, however, be ambiguous because neither the members' affiliates' status, nor the scope of accepted or anticipated membership activity, is determinative. In organizations formed because of shared beliefs or ideals (religious, political, and ideological groups), acts by members or affiliates constituting an expression of those beliefs and ideals are not necessarily done on behalf of and primarily for the benefit of the organization. Members and affiliates of a nonprofit ... engage in many activities ... [that] resemble ... those ... normally carried on by a customer, a principal, or just an interested bystander. Whether these activities should be adjudged to be on behalf of the organization and for its benefit cannot be measured by relational labels or a "scope of membership" test. Neither aegis nor affiliation in the nonprofit sector is able to provide ready answers.

* * * * *

Doctrinal control aside, authority and the right to control are often ambiguous and multidirectional in non-

> profit groups. Confusion and jurisdictional overlap are common—a circumstance not too surprising when the participants have no economic stake in how the lines of authority are run. Moreover, authority and control, rather than being fixed, may shift with time, circumstances, and personalities. In contrast, prerogatives and lines of authority in profit organizations tend to be definite and distinct.

Professors Gaffney and Sorenson (like the dissenters below) identify the serious question whether any agency relationship is involved in the conduct at all (possibly obviating whether the vicarious liability issue even need be reached):

> Often an activity could be on behalf of and for the benefit of either the organization or the member ... No inference of agency can be drawn from activities that advance both the actor's and the organization's interests. The presumption should not be one of agency but one of nonagency.

Id. at 90. In construing 42 U.S.C. §1985(3), this Court has the opportunity to adopt a presumption of *nonagency* in the case of non-profits engaged in advocacy.

Inexplicably disregarding decisions of other circuits which restrict vicarious liability even of an *employer-superior* for compensatory and punitive damages under 42 U.S.C. §1985(3), the Ninth Circuit made vicarious liability the general rule — and applied it to a non-profit for acts of its volunteer. Other circuits follow a rule limiting exposure of *any* superior to injunction only (but not damages, compensatory or punitive) absent "overt acts" (*Adams v. Pate*, 445 F.2d 105, 107 (7th Cir. 1971)) or absent direct involvement through official policy

(*Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979)). Treating the issue as one of novel impression, the court below chose a rule that maximizes inter-circuit conflict and exposes to vicarious liability both non-profit advocacy groups and other organizations of all kinds.

C. Circuits are divided on the important question under 42 U.S.C. §1985(3) whether animus against a church affiliation satisfies the class-based animus test.[12/]

The case presents an opportunity to resolve the conflict as to whether an animus against a religion or church affiliation satisfies the invidious, class-based animus test that this Court's precedents set for private litigation under the second clause of 42 U.S.C. §1985(3). In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), this Court held that *private* racially-motivated conspiracies, involving no state action, could give rise to a claim but warned that this statute was not "intended to apply to all tortious, conspiratorial interferences with the rights of others." *Id.* at 101. Although *Griffin* speculated that some "otherwise class-based, invidiously discriminatory animus behind the conspirators' action" might "perhaps" also be covered (*id.* at 102), only in cases of racial animus against Americans of African descent has this Court held the test to be satisfied. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), discussed, without deciding, whether an animus against women might satisfy the test.

Earlier, without the benefit of this Court's majority and dissenting opinions in *Bray*, the Fourth Circuit had rather summarily held that a religion-based animus could be a basis for a

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12/ Only AFF, Jews for Judaism and Watchman Fellowship join in this reason for granting the petition.

claim. *Ward v. Conner*, 657 F.2d 45 (4th Cir. 1981). Subsequently, the Fifth Circuit summarily reached the opposite conclusion. *Word of Faith Outreach Church Ctr. v. Sawyer*, 90 F.3d 118, 124 (5th Cir. 1996).

Ward involved abduction of a member of the Unification Church in order to "deprogram"[13] him and District Court dismissal of 42 U.S.C. §1985(3) claims against plaintiff's closest blood relatives and others. *Ward v. Conner*, 495 F. Supp. 434 (E.D. Va. 1980). The District Court distinguished between bias related to immutable characteristics (*e.g.*, race, national origin and sex) and ideological ones; and it also held that the defendants were motivated by parental concern for the plaintiff's well-being rather than any discriminatory bias. The Fourth Circuit reversal reached a sweeping conclusion (logically applicable to both political and religious affiliations) based on a single floor speech in the legislative history of the 1871 statute that a conspiracy formed against a man because he was "a Democrat ... or ... a Catholic, or ... a Methodist" presents a requisite animus. 657 F.2d at 48.

Here, the Court will have opportunity to weigh differences between a person's immutable characteristics and his or her ideological affiliations (religious or secular) in light of the overall legislative purpose. And considering a rationale of animus against ideological affiliations, this Court will be able to weigh nuances of subsidiary issues.[14]

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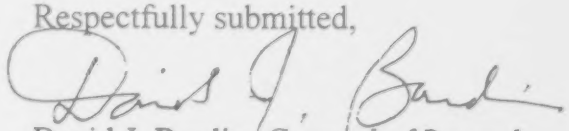
[13] "Deprogramming" standing alone (without unlawful abduction or detention) consists of breaking "the hold of the cult over the individual though reason and confrontation." *Peterson v. Sorlien*, 299 N.W.2d 123, 127 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981).

[14] For example, whose animus? Ms. Landa had not even heard of the Life Tabernacle Church before Mr. Scott's mother sought to extricate him

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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December 1998

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from it (and CAN's office had not heard of it until after all of the unlawful misconduct). Indeed, the District Court regarded CAN's admitted lack of personal knowledge about Mr. Scott's church as a ground for sustaining punitive damages.

APPENDIX

APPENDIX A

CONSTITUTIONAL PROVISION AND STATUTE

The First Amendment to the United States Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. §1985(3) reads, in pertinent part (emphasis of second clause added):

> If two or more persons in any State or Territory conspire ... **for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws**;...; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators.

APPENDIX B

CAN Materials in the Record

Text of two 1990 CAN 3"x 8½" brochures

Retyped from Exhibit 39 (4 pages)
in the trial record below

What Can You Do? B-1
Do's and Don'ts B-2

CAN at a Glance B-3

WHAT CAN YOU DO?

- Inform yourself, your family, and your friends about these groups and what they represent.
- Encourage your school, college, synagogue, church, or office to arrange a program on cults.
- Donate books on destructive cults to your local library.
- Investigate any "training" program offered or required by your company, place of employment, or in the military; do not use current advocates of the program exclusively in your investigation.
- Write your members of congress, senators, state and local officials. Tell them of your concern and report illegal or unethical activities of destructive cults. Assure them that the issues is not one of beliefs but of human rights.
- Encourage media outlets to cover cult activity and respond constructively when such programs air or appear in print.
- Find out if solicitation permits are required in your area. Ask what limitations/ordinances apply to collecting/selling door-to-door, soliciting in shopping centers, or on the street.
- Always ask questions about a solicitor's identity or affiliation. Ask for a valid Federal identification number from charities you want to give to. Call the IRS to verify legitimacy. Be suspicious of charities that have not obtained such a number. Check the Attorney General's office in your state to make sure of registration.
- Check on zoning restrictions regarding single/multiple dwellings and regulations concerning frequent "gatherings" by cults in any neighborhood.
- Never accept an invitation, give money, take a course, or join any group until you have thoroughly checked it out with someone you trust.

DO's and DON'Ts

A guide for families who think a member or friend is involved with a destructive cult:

+ **DO** record all names, addresses, phone numbers of persons known to be associated in any way with the individual's activities.
+ **DO** maintain a written chronology of events associated with the individual's activities relating to the group.
+ **DO** answer all communications from the individual in a loving, sincere, non-critical and consistent manner.
+ **DO** collect related items from newspapers, magazines, and other sources, as well as publications of the group.
- **DO NOT** send money to an individual in a cult if you can send non-cash gifts such as clothing, non-refundable airline tickets, etc.
- **DO NOT** spend large amounts of money for treatments or seminars until you have verified such programs' credentials and qualifications for handling your problem.
- **DO NOT GIVE UP!** Remember the individual is a product of your love, training, heredity, and home environment. These influences can never be permanently eliminated by any technique.
- **DO NOT** feel alone. This is a common problem faced by thousands all over this country and abroad. It affects families of every religious or socio-economic background.

DO seek help, establish and continue an association with an organized group of families with similar situations. We care about you!

READ:

Combating Cult Mind Control, Steve Hassan, Park Street Press, Rochester, VT, 1968, $16.95

Cults and Consequences, The Definitive Handbook, Rachel Andres and James R.Lane, Jewish Federation Council of Los Angeles, 1968, $14.96

Influence, Robert B. Cialdini, William Morris, New York, 1964, $12.45

Cults: What Parents Should Know, Joan Carol Ross, Ed.M. and Michael Langone, Ph.D. Carol Publishing Group, 1988, $5.95

These and other publications are available from the CAN National Office.

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CAN AT A GLANCE!

WHAT IS CAN? The Cult Awareness Network is a national non-profit organization founded to educate the public about the harmful effects of mind control as used by destructive cults. CAN confines its concerns to unethical or illegal practices, includir g coercive persuasion or mind control, and does not judge doctrine or beliefs. Funding comes exclusively from voluntary contributions.

WHO ARE WE? We are former cult members and the families and friends of past and present cult members. Some of us are mental health professionals, lawyers, physicians, legislators, clergy, law enforcement officers and educators. We represent and care about an estimated five million people who have been seriously affected by the more than 2500 destructive cults.

WHAT DO WE DO? We are dedicated to bringing to public awareness the harmful effects of destructive cults and providing information and support for families, as well as assistance to former cult members. CAN recognizes the need for voluntary exit counseling/deprogramming as a means to restore critical thinking, and supports all legal efforts to protect individuals' freedom of choice.

WHERE ARE WE? The Cult Awareness Network is a coalition of volunteer affiliate groups throughout the United States. FOCUS is a support group for former cult members. Communication is maintained with similar organizations throughout the world, including Denmark, England, France, Germany, Spain, Israel, Australia, and Canada.

WHAT IS A DESTRUCTIVE CULT? A destructive cult is a closed system whose followers have been unethically and deceptively recruited through the use of manipulative techniques of thought reform or mind control. The system is imposed without the informed consent of the recruit and is designed to alter personality and behavior.

WHO ARE THEY: Those groups that have engaged in some illegal or unethical practices, including: child abuse, neglect, and death; illegal immigration; drug dealing; fraud and deceit in their recruiting, business, financial, and fundraising activities; theft; harassment of critics, families, and former followers with threats, lawsuits, and foul play; stockpiling or smuggling of weapons and ammunition; beatings, sexual abuse and prostitution; kidnapping; murder; attempted murder; and psychological and emotional damage.

A partial list of groups about which CAN has received complaints, includes the following:

Alamo Christian Fellowship; Ananda Marga; Bible Speaks/Greater Grace World Outreach; Boston Church of Christ/Multiplying Ministries; Children of God/Family of Love; Church Universal and Triumphant/CUT; Faith Assembly; Fellowship of Friends; The Forum/est/The Hunger Project; International Society for Krishna Consciousness/ISKCON/Hare Krishnas; Jehovah's Witnesses; Lyndon LaRouche organizations: Lifespring; Maranatha Ministries; MOVE; Nichiren Shoshu of America/NSA/Soka Gakkai; Peoples Temple/Jonestown; Rajneesh Movement; J.Z. Knight; Scientology/Dianetics/Narconon and more; Sullivan Institute; Synanon; Transcendental Mediation; Unification Church/CAUSA/CARP and more; University Bible Fellowship; The Way International/PFAL/TWIG

ANYONE - *even you* - can be deceived!

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